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Supreme Court of the United States

October Term, 1952

No. 751

PEARL PEARCE, *Petitioner,*

v.

PREVIEWS, INCORPORATED, *Respondent.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

This case originated in the United States District Court for the Southern District of Florida. There was no opinion of the District Court. The decisive ruling was an order entered March 17, 1952, striking Petitioner's affirmative defenses. (R. 14). Thereafter this ruling was confirmed by final judgment on motion for summary judgment, entered June 30, 1952. (R. 20).

The unanimous opinion of the United States Court of Appeals for the Fifth Circuit, on appeal from the final judgment was filed January 29, 1952. (R. 29-31). Petition for rehearing was denied February 25, 1953. (R. 41). These are reported at 201 F (2d) 385.

JURISDICTION

The jurisdiction of this Court is based upon Title 28, Section 1254(1), United States Code, providing that cases in the Courts of Appeal may be reviewed by this Court by writ of certiorari.

However, the jurisdiction to grant the writ of certiorari sought is discretionary and no basis appears for exercise of the discretionary jurisdiction.

None of the "special and important reasons" for the issuance of the writ, prescribed by Rule 38(5) of this Court exist. The petition is merely a "last ditch effort of Petitioner to avoid paying a Fifteen Thousand Dollar debt, which two Federal Courts have on four occasions determined that she owes Respondent.

For this purpose, Petitioner seeks to divert the time and attention of this Court from urgent national issues to review the new construction of a State Statute, based on an undisputed set of facts, by the District Court and Court of Appeals, in the exercise of their diversity of citizenship jurisdiction.

QUESTION PRESENTED

Should this Court review a decision of the Court of Appeals for the Fifth Circuit, in a diversity of citizenship case, involving approximately $15,000, that the proper construction of the Florida Real Estate License Law, Chapter 475 Florida Statutes, is that the President of a New York real estate corporation, who was not a resident of Florida, need only qualify as a non-active broker under this Florida Statute, where he did not perform any acts in Florida, and where the corporation and the person performing all of the pertinent acts in Florida were qualified under the Statute as active brokers, there

being no pertinent or relevant decision of the Florida State Courts on the point, and there being no pertinent or relevant conflicting decision of another United States Court of Appeals?

STATUTE INVOLVED

The State Statute involved is Chapter 475 Florida Statutes, 1951 (hereinafter referred to by abbreviation as F. S.), especially Sections 475.01, 475.13, 475.14 and 475.41 thereof.

The material portions of this Statute are set forth in the Appendix of the Petition and Brief of Petitioner herein, page 37, et seq.

STATEMENT OF THE CASE

This suit involves the attempt of Respondent, who was Plaintiff in the District Court and Appellee in the Court of Appeals, to collect from Petitioner, who was Defendant in the District Court and Appellant in the Court of Appeals, the principal amount of Thirteen Thousand Five Hundred Dollars for breach of a real estate sales promotion contract.

Respondent is a New York corporation, qualified to do business in Florida as a foreign corporation. At the relevant times, it had a branch office in Palm Beach, Florida, under the charge of B. Randolph Shaffer, Jr., a regional vice president. It was registered as an active broker under the Florida Real Estate License Law, Chapter 475 F.S. Mr. Shaffer was registered as an active broker under this law, and John C. Tysen, its President, was registered under this law as a non-active broker. Mr. Tysen was a non-resident of Florida. (R. 9-11).

Petitioner and Respondent entered into a contract for the promotion of the sale of property in Florida belonging to Petitioner, under the terms of which Respondent agreed to do a number of things conducive to the promotion of such sale, and Petitioner agreed to pay Respondent 10% of the sale price of the property, no matter who brought about the sale. A deposit was paid in the amount of Fifteen Hundred Dollars, to be credited upon the final fee due under the contract.

The contract was signed on behalf of Respondent in New York by its President, Mr. Tysen. (R. 5). All necessary acts and services by Respondent in Florida in connection with the contract were performed by Mr. Shaffer, its Florida Vice-President. (R. 31).

Several months after the contract was entered into, the property was sold for One Hundred and Fifty Thousand Dollars. Respondent demanded payment of its fee of 10% of the sale price, Fifteen Thousand Dollars, less the deposit of Fifteen Hundred Dollars, a net principal amount of Thirteen Thousand Five Hundred Dollars. Petitioner refused this demand and the present suit was brought by Respondent in the District Court for the Southern District of Florida. The jurisdiction of the Federal Court was based upon diversity of citizenship, Petitioner being a Florida resident, Respondent a New York corporation, and the requisite amount in controversy existing. (R. 13).

The pertinent defense asserted by Petitioner, was based upon the contention that Respondent had not complied with the Florida Real Estate License Law, because its President, Mr. Tysen, was registered only as a non-active broker, and that hence the contract was invalid.

Respondent moved to strike this defense as being insufficient, immaterial and irrelevant. The District Judge granted this motion. (R. 13-14).

Respondent then moved for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure on the grounds that there was no genuine issue as to any material fact, that the above affirmative defense had been adjudicated insufficient and that Respondent was entitled to a judgment as a matter of law. Filed with the motion was the affidavit of Mr. Shaffer in support of the allegations of the complaint, the material ones of which had been admitted in the Answer. (R. 14-17).

At the hearing on the motion for summary judgment Petitioner for the first time moved that further proceedings in the cause be suspended for a reasonable time to obtain a construction of the Statute by the Florida State Courts. (R. 18, 19). This motion was denied. (R. 20).

The District Court entered a final judgment on the summary judgment motion for the full relief sought by Respondent, finding that there was no genuine issue as to any material fact, that the defense in the answer was insufficient as a matter of law, and that Respondent was entitled to a judgment as a matter of law. (R. 20-21).

Petitioner then appealed to the Court of Appeals for the Fifth Circuit from this final judgment, accompanied by supersedeas. (R. 21-26). After the case had been submitted on briefs and oral argument, the Court of Appeals unanimously affirmed the final judgment and entered judgment of affirmance. (R. 29-32).

Petitioner then filed a petition for rehearing, in which she argued with the Court of Appeals as to the correctness of its opinion. (R. 33-40). This petition for rehearing was summarily denied. (R. 41).

The pending petition for writ of certiorari was thereupon filed, seeking to review the opinion and judgment of the Court of Appeals.

ARGUMENT

I.

Summary

The issue of the present case is uniquely narrow, and no amount of strained semantics can convert it into one warranting review by this Court on certiorari.

There is no constitutional question involved in the opinion of the Court of Appeals sought to be reviewed. There is no Federal question so involved.

There is now involved merely the construction of a Florida State Statute by the District Court and the Court of Appeals, acting in pursuance of their jurisdiction to determine controversies between citizens of different States, and in the absence of a construction of the Statute by the Florida State Courts.

Nor are the facts upon which the construction is based such that a ruling by this Court would be of importance to others as a precedent. It is unlikely that the combination of facts existing in the case at bar would ever occur again. It is improbable that there would be another effort to defeat the claim of a real estate firm for compensation for its services on the ground that its President, who performed no services in Florida, was registered as a non-active broker, although the corporation and its officer, who had performed all of the services in Florida, were fully qualified active brokers under the Florida Statute.

Even the amount involved, above Fifteen Thousand Dollars, is not sufficiently important to warrant this Court in adding consideration of this matter to its heavy docket of cases of national and financial importance.

Petitioner, in her Petition and Brief (P. 10, 14) assigns three reasons for review of this case:

1. That the Court of Appeals ruling was in violation of the Florida Real Estate Law and therefore in conflict with the local law of Florida.

2. That this ruling is in conflict with a decision of the Court of Appeals for the Seventh Circuit.

3. That, after having preliminarily determined the decisive legal question against Petitioner, the District Court should have abdicated its jurisidction, at the request of Petitioner, and permitted the question to be redetermined by the State Courts.

Briefly summarized, our replies to the foregoing contentions are:

1. The Statute involved had never been construed by any Court, State or Federal, as to the point involved herein. The Court below did not violate the local law and did not disregard it. They merely determined what is the local law on the particular question. An analysis of the Statute demonstrates that the construction placed upon it by the Courts below was entirely correct.

2. There is no conflict of the decision herein, with the decision of the Court of Appeals for the Seventh Circuit, relied upon by Petitioner. An analysis of the Seventh Circuit case shows clearly that it involved an entirely different Statute from the one involved in the case at bar, and the question here presented was not remotely present in the Seventh Circuit case.

3. Respondent had the right under the laws of the United States to bring this suit in the Federal Courts and to obtain their ruling thereon. No reason is shown why the District Court should have abdicated its jurisdiction and thus penalize Respondent for starting this suit in the jurisdiction of its choice.

We shall now consider in detail each of these purported reasons for the granting of the writ.

II.

The Construction of the Statute Was Clearly Correct and Not in Violation of the Florida Law

Petitioner contends that the writ should be granted because the Court of Appeals decision was in violation of the Florida Real Estate License Law and therefore in conflict with the local law. (Peto. Br. 15). She further contends that the Court in so ruling violated the public policy of Florida. (Peto. Br. 35).

In her argument on this point, Petitioner illustrates the fallacy of logic known as "begging the question". She assumes that the Florida Statute does invalidate the contract involved, and proceeds from such premise to the conclusion that the refusal of the Court of Appeals to declare the contract invalid was in violation of Florida law.

The very purpose of the construction of the Statute by the Court was to determine whether the Florida law had or had not been violated. When the Court construed the Statute in the manner it did, it found the contract did not violate the local law.

Petitioner utterly fails in her argument to support her sweeping statements that the Florida law has been determined adverse to the ruling of the Court of Appeals. The authorities cited by her set forth glittering generalities so far as the present issue is concerned, but none of them are remotely connected with the point determined herein.

In other words, by her argument on this point, Petitioner has sought "to lift herself by her bootstraps", with the inevitable result of such an effort.

Turning to a brief consideration of the authorities cited by Petitioner on this point, we find that they are as follows:

State ex Rel Baskin et al v. *Bird,* 90 Fla. 335, 105 So. 821 (1925) (Peto. Br. 22), merely holds that both members of a two man partnership must apply for broker's licenses to entitle one to a license.

State v. Rose, 97 Fla. 710, 122 So. 225, 238 (1929) (Peto. Br. 23), upheld the constitutionality of a prior Florida Real Estate License Law, against attack on various grounds, none here pertinent.

Holland v. Fla. Real Estate Commission, 130 Fla. 590, 178 So. 121, 122 (1938) and *Ahern v. Florida Real Estate Commission,* 149 Fla. 706, 6 So. 2d 857, 858 (1942), (Peto. Br. 25), simply interpret the purpose and intent of the Statute, in no manner in conflict with the decision here.

Bratton v. Chandler, 260 U.S. 110, 67 L. ed 157, 43 S. Ct. 43, 67 L. ed. 157 (1922) (Peto. Br. 25) and *Robertson v. California,* 328 U.S. 440, 66 S. Ct. 1160, 90 L. ed. 1366, 1373 (1946) (Peto. Br. 26), were decisions of this Court on constitutional questions relating to Statutes of States other than Florida on entirely different subject matters.

Zichlin v. Dill, 157 Fla. 96, 25 So. 2d 4 (1946) (Peto. Br. 26), simply again upholds the general validity of the Act.

Robert G. Lassiter and Co. v. Taylor, 99 Fla. 843, 128 So. 14, 19 (1930) (Peto. Br. 27, 28), *Citizens Bank and Trust Co. v. Mabry,* 102 Fla. 1084, 136 So. 715, 717 (1931) (Peto. Br. 28), *Mott v. First Nat. Bank,* 98 Fla. 444, 124 So. 36, 37 (1929) (Peto. Br. 28) and *Kellogg-Citizens Nat. Bank v. Felton,* 145 Fla. 68, 199 So. 50 (1940) (Peto. Br. 29), are decisions on subjects far afield from the construction of the Florida Real Estate License Law, e.g., Statutes relating to bidding on contracts, bank stock assessments, parent and child relationships, and married women's notes respectively.

The cases from States other than Florida cited (Peto. Br. 30) are no help at all in supporting her contention that the Court of Appeals decision violated the Florida local law.

Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. ed. 1188 (1938) and *Klaxton Co. v. Stentor Electric Mfg. Co.* 313 U.S. 487, 61 S. Ct. 1020, 85 L. Ed. 1477 (1941), (Peto. Br. 30), are merely decisions of this Court holding that Federal Courts should follow the established local law as determined by the State Courts. In the case at bar there are no rulings nor pertinent decisions of the State Courts—no established local law on the point involved.

There being no decisions, prior to the determination herein, construing the Statute in question, we turn to the Statute itself to see its bearing on Petitioner's defense.

It seems clear to us that the proper construction of the Real Estate License Law is that Respondent's President, J. C. Tysen, was not required to be registered as an active real estate broker in Florida in order to do the only thing in connection with the transaction which Petitioner charges him with, the execution of the contract in New York. It does not appear from the record that anything was done in regard to the contract by any person other than B. R. Shaffer, who was a registered active Florida real estate broker, except the signing of the contract by Mr. Tysen.

Petitioner's brief contains as an appendix the material portions of this Real Estate License Law, Chapter 475 F. S., and reference will be made to the Statute as quoted in this appendix in our discussion of this subject. (Peto. Br. 37, et seq.).

After declaring the name of the law, the Statute in Section 475.01 defines the scope covered by it, stating

that every person who shall IN THIS STATE do the various things in relation to the sale of real estate described, including all persons who are officers or directors of corporations engaged in performing any of these acts or services, shall register as brokers or salesmen. (Peto. Br. 37). (Italics and caps used in this Brief are supplied unless otherwise indicated.)

The Statute further provides in Section 475.14 that an officer or director of a corporation who does not desire to do or perform any of the acts or services enumerated in the above discussed portion of the Statute, may apply for and receive a certificate as a non-active broker. (Peto. Br. 41).

It seems clear that Mr. Tysen did not do nor perform any of said acts or services, because, under the Statute, to bring an act or service within its scope, such act or service must be done or performed *"in this State"*, meaning in Florida. Mr. Tysen signed the contract in New York and not in Florida.

And, as pointed out above, the corporation was qualified as an active broker and the person who did all of the acts in Florida that were done, was an active broker, Mr. Shaffer. Mr. Tysen was a non-active broker, because he did not desire to do or perform any of these acts referred to in the Statute, in Florida.

Accordingly, the Statute is properly construed to mean that Respondent can operate in Florida through its active resident broker, Mr. Shaffer, and that it is sufficient for its President to be registered as a non-active broker, since he does not do or perform any acts nor services *"in this State"*. This conclusion is strengthened by the fact that Respondent itself, as a corporate entity, was not only qualified to do business in Florida, but was registered as an active broker.

Attention is called to the fact that the principal difference between an active broker's registration and a non-active registration is that the former costs $10.00 and the latter costs $1.00. (Petro. Br. 40). In other words, this distinction is principally that of a revenue measure. It would have been a harsh construction, indeed, to hold that Respondent must forfeit the fee of $13,500, to which it is entitled under the contract, and that Petitioner can be enriched by that amount, simply because the State of Florida received only $1.00 on Mr. Tysen's registration instead of $10.00.

Section 475.41, upon which appellant principally relies, states that no contract for a commission or compensation for any act or service enumerated in the defining portion of the Statute, shall be valid unless the broker shall have complied with the Statute in regard to the registration. (Peto. Br. 43). Respondent had so complied with the chapter. It was registered as an active broker, in its corporate capacity; the only person who performed any act or services in Florida was registered as an active broker, Mr. Shaffer, and Mr. Tysen was sufficiently registered as a non-active broker because he did not do or perform any act or service *"in this State"*.

It appears pertinent to cite in this connection *Land Co. of Florida* v. *Fetty*, 15 Fed. (2d) 942, decided by the Court of Appeals for the Fifth Circuit in 1926. In that case the Court of Appeals held that the Statute which preceded the present Real Estate License Law, which was Chapter 9177, Laws of Florida for 1923, did not apply where the plaintiff had entered into a contract in Georgia and had performed no services in regard to a real estate brokerage contract in Florida. The previous Statute, as does the present one, invalidated a brokerage contract where the broker had not complied with the Real Estate License Law. The plaintiff in the Fetty case had not so

complied, yet he was permitted to receive his commission because he performed no services in Florida with reference to the subject matter of the contract.

Accordingly, we submit that the proper construction of the Statute is that Respondent has properly complied therewith through its own registration and that of Mr. Shaffer, and by the registration of Mr. Tysen, who did not act in Florida, as an inactive broker.

The Court of Appeals fully sustained the foregoing principles. Its holding on this point is brief, and is quoted here, for the convenience of this Court. (R. 30-31).

> "It appears that the corporate appellee, as well as its regional vice-president in charge of its Florida office, was registered as an active broker under the Florida Real Estate License Law (Chapter 475, Florida Statutes). The other officers and directors of the corporation, including the corporate president, were registered under Florida law as non-active brokers (Chapter 475, Florida Statutes).
>
> The Florida Real Estate License Law provides that "Every person who shall, *in this state,* (italics by the Court) for another, and for a compensation * * * sell, exchange, buy or rent * * * any real property, * * * and all persons who are members of partnerships or officers or directors of corporations engaged in performing any of the aforesaid acts or services * * *" (emphasis supplied) shall register as brokers or salesmen. Properly construed, this statute did not require appellee's president and the other non-resident officers to hold active real estate broker's licenses from the State of Florida, since they did not do or perform any acts or services relating to the property "in this State". The signing of the contract by appellee's president was in New York and not in Florida. Appellee, as a corporate entity, was qualified to do business in Florida and was registered as an active broker, as was its Florida Vice-President, who, so far as appears, performed all necessary acts and services in Florida in connection with this contract. Under such circumstances, the district court properly

> entered a summary judgment for appellee, on the ground that there was no genuine issue as to any material fact and that the defenses urged were insufficient as a matter of law. See *Land Co. of Florida vs. Fetty,* 15 F. 2d 942."

It thus appears that Petitioner's contentions that the writ should be issued and that this unique and relatively unimportant case should consume the time of this Court, because the lower courts in some manner violated the local law, and were in conflict with the Florida Real Estate License Law, is a shadow without substance and is utterly without foundation. The Statute had not been previously construed and the District Court and the Court of Appeals logically and properly construed it in declaring Respondent entitled to recover that which Petitioner by her solemn contract had agreed to pay.

III.

There Is No Conflict of Decision

Petitioner claims that there is a conflict between the decision of the Court of Appeals for the Fifth Circuit in the case at bar, and a decision by the Court of Appeals for the Seventh Circuit. (Peto. and Br. 10, 12, 14, 30-34).

This contention illustrates the desperate lengths to which Petitioner goes in grasping at straws in order to avoid being required to pay her obligation.

The two decisions are no wise in conflict, nor do they involve the same subject matter.

The Seventh Circuit case referred to, *Reed* v. *Kelly,* 177 Fed. 2d. 473, was a suit between two *individuals.* It was brought by Phillip Reed doing business as P. H. Reed & Company against Irma B. Kelly. No corporation nor corporate question was involved. Reed sued in the Federal Court in Wisconsin for a commission which he

claimed Kelly owed him for work done in Illinois. Reed was not licensed in Wisconsin as a broker and his right to commission was denied, because he was not so licensed.

In the case at bar, the suit was brought by Previews, Incorporated, a New York *corporation*. This corporation was and is licensed as an active Florida broker. The question was whether this corporation's President was required by the Florida Statute to be a registered active broker.

The Reed case involved *application* of the provisions of a Wisconsin Statute; the case at bar involves *construction* of the provisions of a Florida Statute. The Wisconsin Statute was entirely lacking in any of the corporation provisions upon which Petitioner here relies. It provided that *no person* shall bring action for compensation as a real estate broker or salesman without alleging and proving *that such person* was duly qualified as such.

Were the Florida Statute the same as the Wisconsin Statute, the question here involved would not have arisen, and the Petitioner would not even have the technical defense which she here seeks to assert. Respondent did allege and prove that it was duly licensed as an active real estate broker. The question arises with respect to other provisions of the Florida Statute as to which the Wisconsin Statute is entirely lacking.

The conclusion of the Court was that since the enforcement of plaintiff's claim to a contract was forbidden by the positive law of Wisconsin, plaintiff could not recover. Here the question determined was whether the positive law of Florida did forbid enforcement of the contract. As hereinabove pointed out, the positive law of Florida did not forbid such enforcement and the District Court and the Court of Appeals properly so held.

It thus appears that the two cases are clearly distinguishable respecting the character and effect of the

two different Statutes involved. The Court of Appeals herein did not ignore the effect of the Florida Statute but construed it as not affecting Respondent's claim. The Court of Appeals for the Seventh Circuit applied an entirely different Statute, involving entirely different facts, to entirely different principles.

It thus appears that no basis for issuance of the writ exists because of the fancied conflict advanced by Petitioner.

IV.

The District Court Properly Refused to Abdicate

Petitioner contends in her Petition and Brief (Pet. and Br. 7, 8, 15, 34-35) that if the District Court required a decision of a Florida State Court to construe the Statute, it should have granted Petitioner's motion that proceedings in this case be suspended until a Florida State Court decision could be obtained.

As this question is phrased, it would seem a sufficient answer to it that obviously the District Court was in very little doubt as to the clear construction of the Statue, and did not require nor need the help of a State Court to enable it to exercise its diversity of citizenship jurisdiction. The District Court delivered no opinion in the case and its order striking Petitioner's defense was brief, merely striking the defense without assigning reasons (R. 14). The Court likewise found it unnecessary to discuss the legal principles in its final judgment (R. 20). Apparently, the District Court did not find the question troublesome.

Moreover, it appears that Petitioner did not raise in the Court of Appeals this question, nor there complain about the denial by the District Court of her motion to suspend proceedings. This is apparent from the failure of the Court of Appeals to refer to this point, (R. 29-31),

although the opinion obviously covers each of the points raised by Petitioner on appeal.

However, we do not rest our reply to this point presented by Petitioner in the instant application for the writ on the above factors alone, but assert, that it appears clearly that the District Court followed the principles also on this point, enunciated by this Court.

We further assert that each of the authorities cited by Petitioner in support of this contention is not in point and does not support Petitioner's contention. We shall first consider the cases cited by Petitioner and then demonstrate the controlling authorities.

Driscoll v. *Edison Power & Light Co.*, 307 U. S. 104, 59 S. Ct. 715, 83 L. ed. 1134 (1938) (Peto. Br. 8), actually supports our contention rather than the point for which it is cited. In that case, this Court did not refer the issues to the State Court for decision, but held that since the conclusion of the lower court in construing the State Statute was not supported by a State decision, this Court would analyze for itself the provisions of the applicable Statute. We are at a loss to understand how this decision can possibly be considered to support the argument that the District Judge in the case at bar should have referred the issue herein to the State Courts.

In *Thompson* v. *Magnolia Petroleum Co.*, 309 U. S. 478, 60 S. Ct. 628, 84 L. ed 876 (1939) (Peto. 8, Br. 35), the jurisdiction of the Federal Court was founded upon the Bankruptcy Act. A question of the construction of the State law was involved and the Court held that the issue should be submitted to a State Court for determination. Subsequent decisions of this Court demonstrate that this decision was based upon the circumstance that bankruptcy was involved and constitutes an exception to the general rule hereinafter demonstrated.

Likewise, *American Federation of Labor* v. *Watson*, 327 U. S. 582, 66 S. Ct, 761, 90 L. ed. 873 (1946). (Peto. 8), which, incidentally, also originated in Florida, involved exceptional circumstances. There, an effort was made to enjoin enforcement of a new Florida constitutional provision relating to labor unions and the closed shop. This Court referred the matter for construction by the State Courts of these constitutional provisions. It assigned as its reason therefor that the construction of the State Court might be such as to avoid the necessity for the determination by this Court of the Federal constitutional questions raised. This Court held that since it was uncertain what constitutional issues would emerge as the result of an authoritative construction by the State Courts, such a constructmion should first occur. Because of the public interest and constitutional questions involved in the Watson case, it constitutes no precedent for the action in the case at bar, involving only private litigants and their rights, and relating only to a simple construction of a non-complicated statute.

Petitioner also refers to the opinion of Mr. Justice Frankfurter in *Sutton* v. *Leib,* 342 U. S. 402, 72 S. Ct. 398, 96 L. ed 448, 458 (1952) (Peto. 8, Br. 35), in which he stated that the case should be remanded to the Court of Appeals to be held until a decision of the State Courts could be obtained. However, this opinion was not that of the Court, but only of a single Justice. The remainder of the Court (except Mr. Justice Black, who dissented on another ground) held that the Court of Appeals should proceed to determine the question of State Law there involved.

Coincidentally, the leading recent case on this point also originated in Florida, and involved a decision of the Court of Appeals for the Fifth Circuit, the same Court from which the pending petition for writ of certiorari is brought. In fact, it arose in the same District

Court in which the case at bar originated, the District Court for the Southern District of Florida. This decision is *Meredith* v. *City of Winter Haven,* 320 U. S. 228, 64 S. Ct. 7 (1943).

This suit involved a question of law relating to a bond refunding. The Court of Appeals for the Fifth Circuit found that it was in doubt as to the applicable Florida law and ordered dismissal of the suit without prejudice to plaintiff's right to proceed in the State Court. On certiorari, this Court reversed the Court of Appeals, and held that it should determine the questions of State law and should not have abdicated its jurisdiction because of the difficulty of the questions.

In reaching its conclusion this Court stated in opinion by the late Chief Justice Stone:

> "The diversity jurisdiction was not conferred for the benefit of the federal courts or to serve their convenience. Its purpose was generally to afford to suitors an opportunity in such cases, at their option, to assert their rights in the federal rather than in the state courts. In the absence of some recognized public policy or defined principle guiding the exercise of the jurisdiction conferred, which would in *exceptional* cases warrant its non-exercise, it has from the first been deemed to be the duty of the federal courts, if their jurisdiction is properly invoked, to decide questions of state law whenever necessary to the rendition of a judgment. * * * When such exceptional circumstances are not present, denial of that opportunity by the federal courts merely because the answers to the questions of state law are difficult or uncertain or have not yet been given by the highest court of the state, would thwart the purpose of the jurisdictional act.
>
> *"The exceptions relate to the discretionary powers of courts of equity.* * * *
>
> "But none of these considerations, nor any similar one, is present here. Congress having adopted the policy of opening the federal courts to suitors in all

diversity cases involving the jurisdictional amount, we can discern in its action no recognition of a policy which would exclude cases from the jurisdiction merely because they involve state law or because the law is uncertain or difficult to determine. * * * Decision here does not require the federal court to determine or shape state policy governing administrative agencies. It entails no interference with such agencies or with the state courts. No litigation is pending in the state courts in which the questions here presented could be decided. We are pointed to no public policy or interest which would be served by withholding from petitioners the benefit of the jurisdiction which Congress has created with the purpose that it should be availed of and exercised subject only to such limitations as traditionally justify courts in declining to exercise the jurisdiction which they possess. *To remit the parties to the state courts is to delay further the disposition of the litigation which has been pending for more than two years and which is now ready for decision. It is to penalize petitioners for resorting to a jurisdiction which they were entitled to invoke, in the absence of any special circumstances which would warrant a refusal to exercise it.*

"Erie R. Co. v. Tompkins, supra, did not free the federal courts from the duty of deciding questions of state law in diversity cases. Instead it placed on them a greater responsibility for determining and applying state laws in all cases within their jurisdiction in which federal law does not govern. Accepting this responsibility, as was its duty, this Court has not hesitated to decide questions of state law when necessary for the disposition of a case brought to it for decision, although the highest court of the state had not answered them, the answers were difficult, and the character of the answers which the highest state courts might ultimately give remained uncertain."

The italicized language in the paragraph next to the preceding one is particularly applicable to the facts of this case.

Respondent brought this suit in the Federal Court under the right to do so granted to it by Congress. The litigation has been pending since August 1951. Petitioner would have us start all over again in a new forum. This would certainly "penalize Respondent for resorting to a jurisdiction which it was entitled to invoke".

The Meredith case has been followed in a number of subsequent decisions. Some of them are *Huddleston* v. *Dwyer*, 322 U. S. 232, 64 S. Ct. 1015 (1944); *Markham* v. *Allen*, 326 U. S. 490, 66 S. Ct. 296 (1946); *Williams* v. *Green Bay Co.*, 326 U. S. 549, 66 S. Ct. 284 (1946); *Spiegel's Estate* v. *Commissioner*, 335 U. S. 701, 69 S. Ct. 301 (1949) and *Propper* v. *Clark*, 337 U. S. 472, 69 S. Ct. 1333 (1949).

In each of these cases an effort was made to have the Federal Courts abdicate their jurisdiction and to have the pertinent question of State law determined by the State Courts. In each decision this Court, following the Meredith case, held that this should not be done but that the Federal Courts should make the appropriate determination of the State law.

The following language in the Spiegel case, supra, upholding the Court of Appeals determination of a question of Illinois law, is suggestive of the case at bar.

> "The questioned ruling was made by three Judges who are constantly required to pass upon Illinois law questions. One of the three Judges has long been a resident and lawyer of Illinois."

Similarly, the determination of the case at bar was made by three Judges who are constantly required to pass upon Florida law questions, and one of them, Circuit Judge Strum, has long been a resident, lawyer and jurist of Florida. As previously pointed out, these three Judges, including the one from Florida, unanimously agreed upon the clear construction of the involved Florida Statute. It

seems almost presumptuous for Petitioner to suggest that these Judges, or the veteran Florida District Judge, needed aid and assistance by the State Courts in the determining of such a relatively simple question.

It is further to be noted that Petitioner did not make her contention that the matter should be referred to the State Courts for determination until after she had lost the decisive round in the Federal Court. This contention would have appeared more sincere had it been made at the inception of the litigation and before the adverse ruling against her, striking her defense. But she waited until after she was faced with a motion for summary judgment, and it was apparent from the previous ruling that she would lose such a motion, before seeking to transfer the litigation to the State Court. (R. 14, 18).

This is tantamount to an effort by one team in a ball game, which is trailing in the score toward the end of the game and which then seeks to start the game all over again on another field with another umpire. Such tactics should certainly not prevail.

We accordingly submit that the District Court was eminently correct in refusing to abdicate its jurisdiction and that denial of the motion of Petitioner that it do so constitutes no ground for the issuance of a writ of certiorari.

CONCLUSION

Thus, it appears that Petitioner has utterly failed to establish any grounds or reasons for the granting of the writ, and has certainly shown none of the "special and important reasons" set forth in Rule 38(5) of this Court.

There was no prior construction of the Statute. Hence, the Courts below did not violate or disregard the local law, but construed it in a manner which appears clearly correct.

There is no conflict between the decision in the case at bar and the one in the Seventh Circuit relied upon by Petitioner. The Statutes involved in the two cases and the facts to which they were applied were entirely different and unlike.

The District Court properly declined to abdicate its jurisdiction to the State Courts but followed its duty in construing the Statute in the absence of a prior State Court determination of the question. Respondent was entitled to obtain the relief sought in the form of its choice.

For the foregoing reasons it is urged that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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